IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 343 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VIDYA DAIRY - Appellant
Versus
ANAND DUDH VAPARNARI ANE MADHYASTHA GRAHAK SAHAKARI MNDL.LTD & 3 – Respondents

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Appearance :

MR NIKHILESH SHAH FOR DC DAVE for Appellant : 1,
MR HM PARIKH for Respondents :1 - 3.
MR MA PATEL ADDL PP for Respondent : 4,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 08/02/2007

ORAL JUDGMENT

1. Heard learned counsel Shri Shah for the appellant, Shri Parikh, learned counsel for the

respondent Nos. 1 to 3 and learned APP Shri Patel for the respondent No. 4.

2. The original complainant Vidhya Dairy through its General Manager has preferred this appeal under Section 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code' for short) challenging the order of acquittal dated 26.3.1998 passed by the learned Judicial Magistrate First Class, Anand in Criminal Case No. 6831 of 1996 acquitting the present respondents original accused Nos 1 to 3 of charge of committing an offence punishable under Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as 'the Act' for short)

3. This Court (Coram: H.R. Shelat, J.)(as he then was) on 12.4.1999 granted leave and admitted appeal. The same is taken up today for final disposal.

4. The facts in brief leading to filing this appeal deserve to be set out as under.

5. The complainant had to lodge a complaint against the respondent Nos. 1 to 3 in the Court of Judicial Magistrate First Class, Anand being Criminal Case No. 6831 of 1996 alleging that the respondent No. 1 – original accused No. 1 – a registered Cooperative Society and its Chairman – respondent No. 2 – original accused No. 2 and the respondent No 3 – original accused No. 3 – Secretary committed an offence punishable under Section 138 of the Act as the three cheques each

of Rs.1,07,000/- issued on 26.9.1996, 27.9.1996 and 28.9.1996 in favour of complainant were not honoured and they failed to make the payment of the cheque amount within statutory time limit under Section 138 of the Act. The complainant presented these cheques in their Bank in anticipation of receiving the payment against the cheque. As the cheques were not honoured and were returned, the complainant was constrained to address a communication in the form of statutory notice on 12.10.1996. The cheques were returned to the complainant by the Bank on 1.10.1996. The complainant has admitted in his complaint that the respondents sent a demand draft of Rs.2,53,000/- dated 18.10.1996 and Rs.24,000/- in cash on 14.10.1996, which were adjusted against the outstanding amount recoverable from the respondents. This amount was not against the cheque payment in question and therefore, it has been alleged that the respondents i.e. original accused committed an offence punishable under Section 138 of the Act. The trial Court has recorded evidence and the further statement of the accused was recorded, wherein, they denied the case of the prosecution. It was submitted to the Court by the accused at the end of statement under Section 313 of the Code that payment against the cheques was made and the signature of the concerned Manager was obtained on the receipt thereof. The trial Court has come to the

conclusion that the payment against the cheque was made and therefore, when the complaint was filed, there appears to be no outstanding payable to the complainant and therefore, acquitted the accused vide order of acquittal dated 26.3.1998, which is impugned in the present appeal.

6. Shri Shah, learned counsel appearing for Shri Dave for the appellant has submitted that the order of acquittal being erroneous and contrary to the facts on record, the same deserves to be quashed and set aside. The record and proceedings go to show that the factum of issuance of cheque is proved. The factum of issuance of statutory notice is also proved, then, it was the burden cast upon the accused to prove that they had not committed an offence punishable under Section 138 of the Act. Shri Shah has submitted that the cheques in question were returned on 1.10.1996, the complainant was constrained to address a letter to the accused on 12.10.1996, the statutory notice calling upon the accused to make payment against the cheques was made on 12.10.1996, therefore, the respondents were duty bound to make the payment of cheque amount or or before 31.10.1996 as they failed in proving the payment against the cheque before 31.10.1996, they were guilty of committing an offence under Section 138 of the Act. The trial Court's finding with regard to absence of mens rea is erroneous and therefore,

the order of acquittal deserves to be quashed and set aside. Shri Shah, learned counsel for the appellant has invited this Court's attention to the document at Ex. 29, which is a letter dated 18.10.1996 addressed by the accused to the complainant containing the details of payment made against the cheques. He submitted that for the amount of Rs.24,000/- no receipt is produced, however, the learned counsel was fair enough to say that the rest of the amount was received and the receipts were duly exhibited. Shri Shah has contended that the dates mentioned in the letter on which the payment is said to have been made are all dates prior to issuance of notice except the date of 14.10.1996. Therefore, it cannot be said that the amount paid was for discharge of liability accrued out of the issuance of aforesaid three cheques in question. Shri Shah has submitted that the accused were liable to make payment of huge amount and therefore, the amount received as indicated in this letter was adjusted against other outstanding. Shri Shah has also submitted that as per the provisions of Section 138 of the Act, the accused were required to make payment in discharge of the liability arising out of the cheque after receiving the statutory notice. As it is clear from the document that the payment is made even prior to the issuance of statutory notice and therefore, it could be said that the amount was not in fact paid towards discharge of

liability arising out of the three cheques in question. Shri Shah has submitted that evidence on record go to show that as accused have committed an offence punishable under Section 138 of the Act, the order of acquittal deserves to be quashed and set aside and accused be punished appropriately.

7. Shri Parikh, learned counsel appearing for the respondents – original accused has submitted that this being an acquittal appeal, the order of acquittal need not be interfered with in the proceedings under Section 378 of the Code unless and until it is aptly demonstrated by the appellant that the order of acquittal is so perverse as to result into miscarriage of justice. Shri Parikh has also submitted that the accused have in fact, made payment of Rs.3,21,000/- i.e. amount of three cheques in question within the statutory period as the notice itself was issued on 12.10.1996 and therefore, the payment was required to be made on or before 31.8.1996. The complainant has not shown clearly the factum of receipt of money as it is reflected from Ex. 29. Shri Parikh has invited this Court's attention to the averments made in the complaint and submitted that the complainant himself has unequivocally admitted in para-6 of the complaint that the amount of Rs.2,53,000/- by way of demand draft dated 18.10.1996 was received and amount of Rs.24,000/- were received on 14.10.1996 in cash.

Shri Parikh has also invited this Court's attention to the details mentioned in Ex. 29 – a letter dated 18.10.1996 and submitted that the entire amount of Rs.3,21,000/- has been paid and therefore, even the complaint itself was not maintainable. Shri Parikh has also drawn the attention of this Court to the another letter dated 18.10.1996 addressed by the accused to the appellant informing him that the amount was sought to be paid but it was not accepted for the best reasons know to them and therefore, it was paid alongwith that letter. Shri Parikh has submitted that the documents at Ex. 29 and Ex.37 would go to show that amount in fact had been paid against the liability accrued arising out of three cheques in question. Shri Parikh has also invited this Court's attention to Section 59 of the Indian Contract Act, 1872 and submitted that when a debtor owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly. In view of this clear provisions, the submission of Shri Shah that the payment received from the accused was adjusted against the other dues would not be sustainable. Shri Parikh has submitted that the order of acquittal, therefore, deserves to be confirmed and appeal deserves to be dismissed.

8. This Court has heard the counsel at length and perused the records and proceedings. The complainant has in fact admitted in his complaint in para-6 receipt of amount of Rs.24,000/- in cash and demand draft for Rs.2,53,000/- from the accused before the expiry of the statutory demand, in which, the accused were liable to make payment against the cheque amount. Ex. 29 read with Ex. 37 also make it abundantly clear that entire cheque amount of Rs.3,21,000/- covered by three cheques in question was paid by the accused on or before the expiry of the statutory period. Shri Shah himself has admitted that amount was required to be paid by the accused on or before 31.10.1996 as the notice was issued on 12.10.1996. The memo of complaint – document at Ex. 29 and document at Ex. 37 clearly go to show that the amount of Rs.3,21,000/- against the cheque had been paid by the accused before the expiry of the statutory period i.e. 31.10.1996. Shri Shah's submission with regard to the complainant – creditor's right to adjust the amount received from the accused against the other debt also is unsustainable in view of the specific provision of Section 59 of the Indian Contract Act. Shri Shah's submission that only amount received from the accused after issuance of statutory notice could be said to be an amount towards payment against the liability arising out of issuance of cheque is misconceived and deserves to be

rejected. The offence punishable under Section 138 is said to have been committed on failure of the accused to make payment of the cheque amount on or before the expiry of the statutory period mentioned in the section. In the instant case, from the evidence on record, it can be said that the entire amount of Rs.3,21,000/- payable against the three cheques in question was made before the expiry of the statutory period i.e. 31.10.1996, therefore, the acquittal appears to be just and proper.

9. This Court is constrained to observe that the trial Court has erred in construing the fact of absent of mens rea in the conduct of the accused as one of the factors leading towards their acquittal. The proceedings under Section 138 being quasi criminal proceedings, presence of mens rea on the part of the accused cannot be said to be a valid reason for acquittal. The trial Court's reasoning in this regard is certainly not in accordance with law and therefore, that reasoning is required to be reversed but reversal of the finding of lack of mens rea in itself would not change the ultimate conclusion and order of acquittal as acquittal is otherwise absolutely justified and proper looking to the documents and evidence on record.

10. The acquittal of the accused is not unjustifiable nor has it resulted into miscarriage of justice and therefore, the acquittal need not be reversed. In the result,

the appeal fails and is dismissed.

(S.R.BRAHMBHATT, J.)

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